Supreme Court, U.S.
FILED
AUG 14 1995
OFFICE OF THE CLERK

(3)

No. 94-1823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM G. PIERCE, P.E.,
Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

Submitted by:

William G. Pierce, P.E.
pro se

3011 Hampton Court
Maineville, Ohio 45039
(513) 677-5334

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21 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether Pierce and all private sector employers have been denied "equal protection" because of the Department of Labor's approval and issuance of an exemption to all state and local governments from the "salary basis" requirement governing partial day deductions from salaried exempt employees, while holding private employers liable to a rigid interpretation of labor regulations.

II.

Whether the issue of partial day deductions and the "salary basis" test for otherwise salaried exempt employees, as interpreted by the Department of Labor and the courts, is contrary to the plain language of the governing regulations and the surrounding text.

III.

Whether the Portal to Portal Act of 1947, 29 U.S.C. §251 *et seq.*, enacted by the 80th Congress provides protection for the employers, who acted in "good faith", from liabilities concerning otherwise salaried exempt employees that have received "partial day deductions" and are, per the DOL's interpretation of the labor regulations, automatically converted to hourly non-exempt employees by sole virtue of the partial day deductions.

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REPLY TO BRIEF IN OPPOSITION

The following represents the Petitioners response to the Brief in Opposition and incorporates the statements that Pierce contends are misleading. The organization of this reply brief follows that which was used in the opposition brief so the reader can follow the allegedly misleading statements and arguments.

STATEMENTS

In Statement 1, the Secretary so aptly points out that the regulations "further provide in a subsection commonly referred to as the 'window of correction' that an employer who has improperly deducted pay from an employee to reflect partial day absences may be given an opportunity to repay the deducted amount in order to restore retroactively the employees professional status." Yet, as testified in the trial court, Pierce requested to exercise such an option three times and was denied early resolution by counsel for the Secretary. The request came as early as a face to face meeting in November 1988, again during a court ordered mediation hearing when counsel responded that he "wanted to walk away with more money than the window of correction would afford", and once more by letter in January of 1992 which garnered the same response. Given that the "window of correction" is §541.118(a)(6) of the regulations governing professional, administrative and executive employees, Pierce should not have had to bear the cost and disruption to the business to win such a right in district court.

In Statement 2, the Secretary points out that Pierce's employees were paid a set amount that "was reduced when, for personal reasons, the employees worked less than a day." Yet counsel for the Secretary failed to point out that the 105 hours of deductions were made when work was available but the employee was not "ready, willing, and able to work" (§541.118(a)(1)) due to pursuit of recreational activities, and chose not to (1) charge the time to accrued leave as acceptable to the Secretary of Labor, or (2) make up the time missed commensurate with their salary at their own convenience.

In Statement 3, the Secretary gives an abbreviated yet concise timeline of the actions of the court below. However, Counsel for the Secretary failed to acknowledge that Pierce had offered to "open the books to an auditor of the Court" to substantiate his claim of temporary inability to pay. When an environment has been built to support thirty employees yet is being supported by a remaining two it is quite obvious that a very

difficult financial situation exists[1]. In addition to the offer stated above, Pierce filed with the court below the cover pages of the foreclosure proceedings on his family's home and the business's office building, eviction notice of the Louisville office, and repossession notice of a significant portion of the furniture and equipment in the Cincinnati and Louisville offices. The Secretary never objected to those documents; the authenticity of those documents has never been challenged.

In Statement 4 the Secretary points out that the court below rejected Pierce's claim that "a day" is not defined in clear definitive terms for the reasonable person by quoting the 6th Circuits decision stating that the term "day" refers to the "standard, eight hour day." Counsel for the Secretary failed to note that such a definition given by the court below would preclude an employer/employee arrangement of four ten hour days constituting a workweek and is contrary to the Secretary's own position that a "day" means "the employees customary work day, whatever number of hours that may be." (See Gov't. C.A. Br.24) If conflict exists in the meaning of a "day" between the DOL's position and the 6th Circuit's decision, it is entirely understandable that the "reasonable person" can construe an alternate meaning of the undefined phrase when applied to today's jargon and in today's workplace environment.

ARGUMENT 1 - "equal protection"

The Secretary states in the 1st Argument that Pierce did not raise the issue of private employers being held to a more restrictive definition of "salary basis" than that of public employers and that the court below did not decide the issue. Yet in footnote 7 (Resp. 8), the Secretary states "petitioner argued that the more lenient definition of 'salary basis' used in the public employee context made 'common sense', and argued that the same standard should apply to the employees of private employers." It

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[1] Pierce requested of the trial judge in the Fall of 1992 for additional time in which to reimburse the former employees for the deducted hours in order to sell his family's residence and raise the necessary funds. See Pet. 6 n.2.

is axiomatic that a party cannot make a court decide an issue. The most a party can do is present the issue. As the Secretary recognized in footnote 7, the issue of disparative treatment between public and private employers was in fact presented. The Secretary is also correct that the court below did not issue a ruling on the argument and is the specific reason why the issue of "equal protection" is ripe for review by this Court.

Furthermore, this Court has ruled that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them, and orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering,* 61 S.Ct. 719 (1941). "The general rule that an appellate court does not give consideration to issues not raised below should not be applied where the obvious result would be a plain miscarriage of justice." *Id* at 719[2].

The next point the Secretary attempts to make is that "petitioner's conduct occurred prior to the Secretary's adoption of a different 'salary basis' test governing public employers ..." and "... thus has no standing to challenge in this lawsuit the distinction presently drawn by the Secretary between employees of public and private employers." The argument is predicated on the fact that the Final Rule, making such a distinction, was not adopted until August 14, 1992. However, the DOL announced on January 9, 1987, that the agency would "not enforce the 'no partial-day deduction' rule against state and local governments in discrete circumstances." *Federal Register* Vol. 56, No. 173, p.45824. The directive was issued just seven days prior to the Department's release of 29 CFR 553 Application of the Fair Labor Standards Act to Employees of State and Local Governments, Final Rule in which it states

> (c) Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside capacity,

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2 Citations as written in Headnotes 5 and 6.

> as these terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary. *Federal Register* Vol. 52. No.11. p.2038 (emphasis added).

Thus in one week the DOL states that (1) public employees must meet "all of the pertinent tests ... salary" and (2) they will not enforce the partial-day component of the salary basis tests for public employers and their employees. Moreover, the "non-enforcement" policy directive was in direct conflict with the FLSA's application to public employees as required by the Fair Labor Standards Amendments of 1985 (Public Law 99-150). The January 16 Final Rule (29 CFR 553) was a correct interpretation of "holding public employees to the 'salary basis' test", but then the DOL eviscerates that requirement through the non-enforcement policy. The "non-enforcement" policy established a basis to make a distinction between public and private employers, thus the eventual denial of "equal protection" for the private sector employees and employers.[3]

The Secretary continues within the first argument to state that such a distinction has a "rational basis" and is within the scope of the agency's power, as established by Congress, to "define and delimit" the terms of professional / executive / administrative positions. Counsel supports their theory that the distinction is right and rational, and comports with equal protection principles by citing this Court in *McGowan v. Maryland,* 366 U.S. 420, 425 (1961), "[a] classification that treats some groups differently from others, but is not based on suspect classification and does not affect fundamental rights, is valid if it has a rational basis." What "rational basis" exists if such an exemption is in direct conflict with the explicit Congressional intent in amending these statutes so that it specifically applies to public and private employees alike? What "rational basis" exists if

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[3] Also note that this date occurs in month six of the twenty-four month period that the Pierce audit covers.

such an exemption is in direct conflict with the Departments own interpretation of Congressional intent?

The respondent's brief also curiously directs the Court to a prior decision *Tony & Susan Alamo Found. v. Secretary of Labor,* 471 U.S. 290, 306 n.32, (1985). In that decision this Court decided that an employers activities were not beyond the reach of the FLSA, and "...its associates are 'employees' within the meaning of the Act because they work in contemplation of compensation. Like other employees covered by the Act, the associates are entitled to its protection." *Id* at 306. Are the employees of State and local governments not working "in contemplation of compensation", and should they not be afforded "[FLSA] protection"? After all, if the DOL interprets Congressional intention to disallow partial-day deductions for private employers and employees, and Congress has applied the FLSA, including Section 13(a)(1) exemption for Professional, Administrative, and Executive employees to all State and local public employers, as reported by the DOL in the Final Rule dated January 16, 1987, does that not say that the DOL is developing regulations that do not comport with Congressional statutes?

The Secretary then relies on the argument that the "unique nature of public employment" justifies the salary test exemption given only to public employers. However, this Court has ruled that such a uniqueness does not exist, even when applied to "traditional" functions of government. See *National League of Cities v. Usery,* 426 U.S. 833 (1976); and *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

The final justification the Secretary attempts to use in explanation of the "rational basis" is that public employers are subject to "principles of public accountability" and as such can not be paid for times when not working. Counsel for the Secretary seeks to paint the picture that the only reason for adoption of the Final Rule granting an exemption to public employers was due to such reasoning that some State and local statutes preclude a public employee from being paid when not working.

A review of the Interim and Final Rules provides more than the single explanation to avoid conflict with local and state regulations. It provides great concern as to "the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees.... Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices...." *Federal Register* Vol. 56, No.173, p.45825.

Further insight can be made into the Department's motives by looking at the regulatory history of the "salary test" pertaining to public versus private employers. The initial "salary test" exemption adjustment was the "non-enforcement policy" made public in January of 1987 for the "discrete circumstances" where applicable State or local law prohibits payment for such absences which are not covered by paid leave. If the "rational basis" was and still is solely to avoid conflict with existing statutes, the DOL could have stopped with such a change in regulation. However, the Agency went several steps further within the Final Rule by applying the exemption to <u>all</u> public employers without regard to whether local or State laws requires such an action. Furthermore, the Secretary provided an exemption for "deductions due to budget- required furloughs." Such action is in total conflict with the regulations §541.118(a)(1) wherein it states "[a]n employee will not be considered to be on a 'salary basis' if deductions ... are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly if the employee is ready, willing, and able to work, deductions may not be made...", and goes beyond the stated need to comport with the issue of "public accountability" for State and local government statutes.[4]

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[4] An additional indication that the decision to grant an exemption to the "salary test" for public employees was for "cost" reasons rather than the stated compliance with State and local statute requirements can be seen in the Secretary's cross-appeal in the *Mueller v. Reich* case decided by the 7th Circuit:

> "The Department's reason for wanting to cross-appeal is that it is distressed by the district court ruling that the new regulation, though valid as far as it goes, should have gone further and exempted public employees

Whereas the Secretary attempts to paint the picture that the granting of the rule change for public employers and employees was in an effort to comport the new interpretation with State and local statutes, subsequent actions show that economic issues quickly became the overriding concern. "But there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." *Alabama Power Company v. Douglas M. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979). Therefore, to be valid the change must be consistent with the FLSA's purpose and not contrary to the statute. Furthermore, given that Congress and this Court have included all public employees under the umbrella of the Act, the consistency of the rule change must apply to all employees covered, including both public and private.

The Secretary continues with the opposition that the regulation change is "...clearly a valid exercise of the broad rule making authority granted to the Secretary...." See Resp. 12 n.10. In relying on *Batterton v. Francis*, 432 U.S. 416 (1977), the Secretary overlooks two key points made therein: (1) "...administrative interpretations of statutory terms are given important but not controlling significance..." *Id* at p.424; and (2) "[v]arying degrees of deference are accorded to administrative interpretation, based on such factors as the timing and consistency of the agency's position...." *Id* at p.425. What effect does "timing" have on the Department's interpretation when the "general requirement that an exempt employee be paid on 'a salary basis'

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from the disciplinary limitation in the salary-based regulation as well as from the prohibition against pay deductions for missing part of a day's work.... That is precisely the ground of the Department's appeal here, as its lawyer acknowledged at the argument." *Mueller v. Reich*, 54 F.3d 438, 441 (7th Cir. 1995).

The court did acknowledge the validity of the Department's rule change for public employees, but was not asked to address, and did not address, whether the rule should be applied to private employers as well. The court did raise the possibility when stating "[i]t might be possible to question the rationality of the rule with respect to *all* employees, private as well as public..." Id., 54 F.3d at 443.

has been an integral part of the regulations since 1940, and 29 CFR 541.118 ('salary basis') and has remained essentially unchanged since revisions were last made in 1954." *Federal Register* Vol. 57, No. 161 p. 37672 n.11. Yet litigation against private employers with regard to §541.118(a)(2) did not surface until the mid 1980's. The oldest caselaw dealing with partial-day deductions for personal reasons that the Department has used in its litigation against Pierce is 1990 for an audited period of June 1986 to May of 1988! Furthermore, what effect does "consistency" have when the DOL ignores a phrase within the regulation for over 45 years, then litigates against public employers interpretation, then issues a "non-enforcement" policy seven days prior to its granting the Final Rule extending full FLSA coverage to public employees, and finally without notice commenced enforcement against private employers?

To summarize, this Court held in *Garcia* that there was no impediment to having the FLSA apply to public employees. Congress then amended the FLSA so that it applied equally to public employees as well as private employees. Then the DOL decided to circumvent the amendment by providing an exemption from the "salary basis" test for "professional / administrative / executive public employees. That exemption is not only disparative treatment but also is beyond the DOL's regulatory authority.

ARGUMENT 2 - "a day or more"

In the Secretary's second argument, Counsel relies on three decisions to support the claim that partial day deductions are not permissible. However a review of all three will show that none of them dealt with the issue of a partial day deduction due to an absence for personal reasons and at a time when work was available but the employee was not "ready, willing, and able to work". Furthermore, none of the cases involved an employment arrangement that would have allowed the application of accrued leave to cover partial day absences as is acceptable by the DOL and as Pierce's policy allowed.

Klien v. Rush-Presbyterian-St.Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993), involved partial day deductions for disciplinary reasons because of rules and safety infractions, thus a violation of §541.118 (a)(5), and not because partial day absences for personal reasons.

Donovan v. Carls Drug Co., 703 F.2d 650 (2nd Cir. 1983), differs from Pierce's case in that it dealt with a willful violation of the regulations, and a judgement against the employer was entered when the employer failed to timely defend his actions. Furthermore, Carls had been audited on eight separate occasions and found to be in violation five times. In contrast, the compliance officer testified at the trial court that a subsequent audit of Pierce found him to be in total compliance.

Michigan Ass'n. of Government Employees v. Michigan Dep't. of Corrections, 992 F.2d 82 (6th Cir. 1993), is not directly applicable to Pierce in as much as it involves a public employer that was covered by the 1992 Final Rule "salary basis" test exemption. The case does support Pierce's position that the phrase "a day or more" may allow partial day deductions without affecting the salary exempt employee status, and poignantly shows that confusion and conflict over partial day deductions does indeed exist. In the Michigan case, the court ruled that "[s]ick leave policy ... authorizing compensation reductions for absences of less than one day, did not jeopardize status of supervisors as salaried employees exempt from overtime requirements...."; yet in the decision involving Pierce in the case below it did jeopardize such status. Given that the exemption for absences due to sickness, as written in the regulations §541.118(a)(3), utilizes the same requirement of "a day or more" as does the exception for personal reasons §541.118(a)(2), the 6th Circuit has on one hand ruled that "a day or more" allows for deductions of less than a day when dealing with sickness yet on the other hand rejects a similar position when dealing with absences occasioned for personal needs, such as a round of golf.[5]

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[5] Such a conflict raises numerous issues and questions in what a "day or more" means and when are partial day absences allowed and when are they disallowed. Does the sickness exemption only apply to the employee or will

The Secretary continues the argument that there is no confusion as to what constitutes a "day" as the "...Secretary has interpreted that term, consistent with its ordinary usage, to mean the employee's customary work day, see Gov't C.A. Br. 24-26, and the court of appeals likewise recognized that the term to connote 'the standard eight-hour day," Pet. App. A5." Such a conflict of interpretations leaves an employer in a real quandary when considering four 10 hour days as a normal workweek. It would appear that a deduction of two hours would comport with the 6th Circuit, yet be forbidden by the Secretary.

ARGUMENT 3 - Portal to Portal Act

In Argument three, Counsel for the Secretary argues that Section 10 of the Portal-to-Portal Act does not apply and that the bar to liability and penalty for "good faith" reasons is not applicable since Pierce did not prove his actions were indeed done in "good faith." Pierce's reply need only restate what the trial judge found as a matter of fact in the original decision: "...[Pierce] intended to pay his employees on a 'salary basis', intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable." Pet. App. C8. In addition, when Counsel for the Secretary withdrew the "willful and purposeful violation" claim at the trial court just prior to opening statements, he was acknowledging that the omission was done in "good faith". After all, if not "willful" and not "purposeful" then "good faith" must be the situation, and one of which the Secretary conceded.

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the illness of a child apply if the employee leaves to provide transportation to the doctor or hospital? Furthermore, is the sickness strictly limited to physical illness or does mental stress or tension also apply? If so, does a relaxing therapeutic hour spent fishing in order to relive the stress and tension qualify or does the employee have to go to the doctor or home? How is the employer to monitor the employee's actions after he/she leaves work? How many of the 105 deducted hours in the case against Pierce can be attributed to sickness? Regardless of the answers to the hypothetical questions posed above, the 6th Circuit has developed two totally differing decisions relating to the interpretation of "a day or more", both of which are contrary to the Secretary's and thereby extending a considerable amount of confusion into understanding the term "a day or more" for a reasonable person.

Congress was very clear in the Portal to Portal Act of 1947 that businesses would be ruined (as happened to Pierce) if they were subject to liabilities for violations of the FLSA when their was a "good faith" attempt to comply. If the Secretary is correct that Pierce employees where not salaried exempt, then the Portal to Portal Act's preclusion from liability for "good faith" compliance bars the DOL's action against Pierce. Either the employees were salaried (in which case there is no liability) or the salaried exemption was lost even though there was a "good faith" attempt to comply (in which case the Portal to Portal Act provides a complete defense)[6].

ARGUMENT 4 - "window of correction"

In Argument 4, the Secretary presents a discussion of the "window of correction" that is in direct conflict with his own previous statements. See Resp. 3-4 and 16 n.11. In the Statement 1, the position leads the reader to believe that the "window of correction " is relatively a matter of fact that Pierce could and should have exercised. Further, "... that an employer ... may be given an opportunity to repay the deducted amount in order to restore retroactively the employee's professional status." Yet as shown in the footnote (see Resp. 16 n.11), the Secretary acknowledged his opposition to the award of the window of correction to Pierce because "...petitioner had not made deductions inadvertently and because petitioner did not otherwise pay the employees in question on a salary basis, he was not entitled to take advantage of the window of correction."

The Secretary is again ignoring the precise wording of the window of correction by omitting "... or for reasons other than

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[6] PORTAL TO PORTAL ACT OF 1947 (29 U.S.C. §251)

"SECTION 10 Reliance in Future on Administrative Rulings, etc.

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on the account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 ... if he pleads and proves that the act or omission complained of was in good faith ..." See also Pet. 27-33 and D1-D2.

lack of work..." after the exception for inadvertent deductions. Furthermore, Counsel argues that the employees were not otherwise paid on a salary basis; yet, the Secretary acknowledges that all other aspects of the salary tests were met. If the sole issue of partial day deductions removes an employer from the salary test, then the window of correction becomes meaningless.

CONCLUSION

The issue at hand involves one dealing strictly with salaried employees working in an executive, professional and/or administrative positions. As the Department of Labor has pursued litigation in this arena they have very carefully crafted their approach under the title of "pay-docking" and as such created a very negative connotation. The real issue is whether salaried employees have the right to work within a flexible system and establish their hours of effort commensurate with their salary within a time frame convenient to them and their families.

The working environment today has changed considerably from that of the 1940's when the "salary basis' test was originally established. The personal and family needs of the semi-retired professionals, the two income family, or the single working mother or father not only requires, but demands, flexibility within the working hours.[7]

Whereas this litigation began in 1988 as a single case of the DOL versus a private employer, the implications of a review by this Court will affect nearly every employer and employee in the nation. While the DOL has provided the relief from the threat of "potentially enormous and generally unexpected back wages ... [that] could seriously threaten the fiscal integrity of State and local government agencies....", private employers have faced rigorous enforcement and are deserving of the same "equal protection" from fiscal ruin. Furthermore, the exemption given to public employers has enabled their employees to benefit from the resulting flexible leave arrangement -- an "equal protection" that must be afforded their private employee counterparts.

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[7] Appendix A is the Congressional testimony of a "single parent."

APPENDIX A

Written Testimony of Phyllis G. Diosey, Ph.D.
Prepared for the
Committee on Economic and Educational Opportunities
U.S. House of Representatives
Subcommittee on Workforce Protections
March 30, 1995

Introduction:

My name is Phyllis Diosey. I am employed as a Senior Air Quality Specialist with Malcolm Pirnie, Inc. an environmental engineering firm in White Plains, New York. I am also the mother of Alyssa Kate, who is 12 years old. My husband died when Alyssa was a year old, and since then, I have been working to support both of us.

Discussion:

As a professional scientist employed by one of the nation's leading environmental consulting firms, my primary responsibility is to get my job done properly, on time and within budget. As a mother and single parent, my responsibility is to raise my daughter and provide her with the best opportunities I can. Trying to accomplish both of these jobs takes a lot of juggling and creative time management. I feel very fortunate to work for a company like Malcolm Pirnie that goes out of its way to help me accomplish both of these goals by allowing me flexibility in my work schedule.

I explained this need for flexibility in a letter which I wrote in 1993 to John Foster, Chairman of the Board of Directors at Malcolm Pirnie. Occasions do arise, such as illness, school holidays, snow days and school delay days, when I have no choice but to take charge of my daughter during routine working hours. These occasions often occur when the workload is such that I cannot simply write off the day. So I shift hours, bring work home when I can, or bring my daughter to work when I can't be out of the office. I think that this is fairly typical of the balancing

act that many working parents perform today. I am very grateful that Malcolm Pirnie has supported me in this. Other parents, especially working women who still shoulder most of the responsibility as caregivers, are not as lucky, and may be penalized for trying to cope with the realities of modern life.

Let me explain the background of a Malcolm Pirnie flexible leave practice that brings me here today to testify.

Back in June of 1988, I charged four hours of my time to unpaid absence on my time sheet. I was told later that charging this four hours to unpaid leave led to my being designated by the Department of Labor as an "hourly" worker for about a two year period of time. I really don't remember why I needed the time off in 1988. I would guess that, by the time of year, it was related to school. My daughter was in kindergarten at the time. Having worked at Malcolm Pirnie for a little more than a year, I was entitled to only two weeks of vacation. I voluntarily took unpaid absence rather than use any of my vacation or other leave time. Anyone who depends upon organized childcare, as I do, knows that there are times of the year, such as the week after school closes, or the week or two before school opens in September, when many childcare centers are closed. Because of this, vacation time becomes more than just the chance to spend an extended length of time with your children; it becomes an absolute necessity to fill the gap between daycare and school. Since I wanted to save my leave time, I chose to charge this four hour increment to the "leave without pay" account. I work hard at my job and take pride in what I do. I expect <u>fair</u> compensation for my work, not a "free lunch" from my employer. At Malcolm Pirnie, this philosophy appears to be mutual since my employer still voluntarily pays me additional compensation on a "straight time" basis for hours I work in excess of forty.

In the *DOL v. Malcolm Pirnie* case, I understand that a few other professional colleagues also chose to charge some of their time off to this account. I am advised that the sum of all part-day "leave without pay" deductions amounted to about $3300 for 24 employees over a two year period. According to my

employer, these deductions totaled about 100 hours out of more than one million hours worked during the same period. When Malcolm Pirnie became aware that such deductions were prohibited by law, they voluntarily reimbursed me (and the other employees) and clarified the company policy to prevent future deductions of this kind. I was latter told that the effect of those part-day deductions, according to the Department of Labor (DOL), converted all employees in my class (about 400) from salaried professional to "hourly" workers who must be paid time and one-half for any overtime worked. As a result DOL sought additional overtime compensation for about 400 highly skilled and well compensated professional engineers, scientists and the like for a 19 month period. The total additional compensation (including interest) amounted to approximately $875,000.00. This Draconian "all or nothing" approach by DOL led to financial hardship for my employer and unexpected payments to employees who never sought additional compensation. In the end, the employees of Malcolm Pirnie have lost flexibility. In the wake of conflicting court cases, the firm was forced to change its leave policies for exempt employees as follows:

- Employees must use their sick leave in full day increments.
- Employees are not permitted to request time off without pay in part-day increments.
- Employees must use their vacation leave in full day increments.

Quite simply, the flexibility which I need has been limited.

Some other points are also in order.

Apparently when it developed the regulations under the Family Medical Leave Act, DOL recognized the need for exempt employees to take part-day unpaid leave to handle family and medical obligations. However, I am advised that this type of FMLA Leave is extremely limited by the law and its regulations, and small firms who adhere to the principles of the FMLA would violate the FLSA. In addition, the Department of Labor has chosen to exempt certain professionals such as doctors, lawyers and computer professionals (but not other professionals such as architects, engineers or accountants) from its prohibition against

part-day unpaid leave. These distinctions do not make sense to me.

Regarding time sheets, in our case DOL cited the fact that we record hours on a time sheet as an indication that we are hourly employees. However, I do not regard myself or my colleagues at Malcolm Pirnie as "hourly" workers simply because we fill out time sheets. Time sheets are the only way a consulting firm has to track the time spent on each job. At Malcolm Pirnie, we have engineers, scientists, architects, draftspersons, and other specialists that make up our project teams. When we get a request for work from a client, one of the first things that the client wants to know is how much will it cost? We cannot bill our clients the same fee for each job because each job is different.

In most cases as a professional consulting firm, we must account to our clients for each work hour. In addition, the majority of my employer's clients are state, local and federal government agencies. Ultimately we are accountable to the public for the time we spend on these projects. This "public accountability" rationale is reflected in the stringent cost accounting standards that apply when we preform work for public entities. These standards specifically prohibit paying employees for time not worked! However, when we follow the Department of Labor mandate to charge such time as paid leave, we increase our overhead rates, incurring potential objections from government contract auditors as well as from our clients. It is also my understanding that, based on this same "public accountability" rationale, DOL has decided to exempt public employees from the regulations we are discussing today. However, Malcolm Pirnie who is subject to this same accountability is not exempt from these regulations. Again, I don't understand the distinction.

Finally, in some organizations the loss of "salaried" status has a significant impact on the availability of employee benefits. While this is not the case at Malcolm Pirnie, I am concerned that the loss of exempt status may result in a reduction of employee benefits available (especially medical benefits) to other persons

having circumstances similar to me and who have the most need for such benefits.

CONCLUSION:

I think the security, career growth and future of every employee is linked with the successful operation and financial health of the company that they work for. The salary I am paid fairly takes into account my professional status. I should be free to decide with my employer, a mutually acceptable arrangement regarding my work situation without government intervention or restrictions upon that flexibility. The regulations should be modified to protect my rights as a professional employee while allowing employees and employers the flexibility to cooperatively arrange work schedules that result in high productivity and competitiveness. Moreover, I also know that the phrase "protecting employee rights" in today's world has many more dimensions than it did when my mom and dad entered the work force in the 1930's. For a standard to be fair today, it should permit flexibility for both the employee and employer. Under the current system, there appears to be little leeway for either group. The present approach puts professional working mothers especially at risk because the rigid standards make these women appear less productive and less attractive as employees, jeopardizing their future in the workplace. I hope that you will be able to modernize the laws that govern the workplace so that they truly reflect today's workstyles and lifestyles.

I thank you for allowing me to speak to you today.